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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 1024

ALABAMA POWER COMPANY, A CORPORATION, PETITIONER

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF, ET AL.

No. 1025

ALABAMA POWER COMPANY, A CORPORATION, PETITIONER

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF, ET AL.

No. 1026

IOWA CITY LIGHT AND POWER COMPANY, A CORPORATION, PETITIONER

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court appears in the record at I, 437. The opinion of the Court of Appeals, not yet reported, appears in the record at II, 1279.

JURISDICTION

The petition was filed May 26, 1937. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that petitioners, as holders of non-exclusive franchises for the generation and distribution of electric power, have no standing to challenge the validity of proposed loans and grants of Federal funds to municipalities for the construction by them of electric distribution systems, the construction and operation of which are admittedly lawful undertakings of the municipalities.

STATUTES INVOLVED

In No. 1024 the proposed loans and grants are to be made pursuant to Title II of the National Industrial Recovery Act, c. 90, 48 Stat. 200, as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, c. 48, 49 Stat. 115. In Nos. 1025 and 1026 the proposed loans and grants are to be made pursuant to the Emergency Relief Appropriation Act of 1935, *supra*.

STATEMENT

As originally brought, these were five suits in the District Court for the District of Columbia, seeking to enjoin the making of loans and grants by the United States to ten municipalities for the construction of electric-power distribution systems by those municipalities as part of a national program of public works. The plaintiffs were, respectively, the Texas Utilities Company, the Alabama Power Company (in two cases), the Oklahoma Utilities Company, and the Iowa City Light and Power Company. The defendants are the Federal Emergency Administrator of Public Works and certain of his subordinates, together with the Secretary of the Treasury, the Treasurer of the United States, and the Chief Disbursing Officer of the United States (Fdgs. 1–12, R., Vol. I, 447–450. These cases were chosen for trial by agreement of counsel as representative of fifty-seven similar cases pending in the District Court for the District of Columbia.

Prior to submission in the court below, several of the cases had become moot by virtue of agreements reached between the cities and the companies. This is true of the suits by the Texas Utilities Company and the Oklahoma Utilities Company, and of the suit of the Alabama Power Company in so far as it related to the proposed loans and grants to the Cities of Florence and Tuscumbia, Alabama. The cases remaining are as follows:

1. *Alabama Power Company* v. *Ickes et al.*, No. 1024, involving loans and grants to two cities in Alabama: Decatur and Sheffield. The bill of complaint in this case appears at pp. 216–248 of Volume I of the Record, and the answer of the defendants at pp. 250–259.

2. *Alabama Power Company* v. *Ickes et al.*, No. 1025, involving loans and grants to three cities in Alabama: Guntersville, Hartselle, and Russellville. The bill of complaint in this case appears at pp. 334–366 of Volume I of the Record, and the answer of the defendants at pp. 368–377.

3. *Iowa City Light & Power Co.* v. *Ickes et al.*, No. 1026, involving a proposed grant only, to Iowa City, Iowa. The pleadings in this case are printed in a separate volume. The bill of complaint appears at pp. 2–30 (exclusive of exhibits) and the answer of the defendants at pp. 102–113.

The loans and grants involved in case No. 1024 are proposed to be made under the authority of Title II of the National Industrial Recovery Act, 48 Stat. 200, as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115. The loans and grants involved in cases No. 1025 and No. 1026 are proposed to be made under the authority of the Emergency Relief Appropriation Act of 1935 (Conclusion 11, R., Vol. 1, 470). Each of the bills of complaint sought injunctive relief on the ground that the statutes authorizing the proposed loans and grants are un-

constitutional and that the loans and grants themselves are unauthorized by the statutes.

The cases were consolidated for trial before Chief Justice Wheat. The trial consumed fifteen days (R. II, 1). Forty witnesses were called and numerous documents were introduced. After the conclusion of the trial, the Chief Justice rendered an opinion, holding that the statutes involved are constitutional, that the action contemplated by the defendants is authorized by the statute, and that the plaintiffs were entitled to raise these questions (R., Vol. I, 437–447). Thereafter the court entered comprehensive findings of fact and conclusions of law (R., Vol. I, 447–468, 468–472).[1] The basic facts as disclosed by the record and found by the trial court are as follows:

The plaintiffs' franchises.—None of the plaintiffs has an exclusive franchise. The franchises granted to the Alabama Power Company by the cities of Sheffield and Tuscumbia expired in Octo-

[1] The findings of fact and conclusions of law of the trial court as they appear in the Record are headed by the caption "Defendants' Proposed Findings of Fact and Conclusions of Law." Findings and conclusions were prepared by counsel for plaintiffs and counsel for defendants at the request of the trial court after the opinion in the cases had been rendered. The draft submitted by the defendants was changed by the court in several respects after much discussion with counsel for both plaintiffs and defendants. The words "Defendants' Proposed" were inadvertently left in the caption of the findings and conclusions as they appear in the Record and have no significance.

ber 1932 (Fdg. 15, R., Vol. I, 451). The franchise of the Alabama Power Company granted by the city of Decatur became effective on January 27, 1920, for a period of thirty years. The franchises granted to the same company by the towns of Hartselle, Guntersville, and Russellville are indeterminate, non-exclusive franchises (*ibid.*). The franchises granted to the Iowa City Light & Power Company expired in 1932 (Fdg. 16, R., Vol. I, 451). The question of a renewal of the franchise was submitted to a popular vote in October 1932, and the renewal was rejected. The franchise thereafter expired on January 11, 1934, in accordance with its terms (*ibid.*).

Authority of cities to build plants.—All the cities are authorized under State law to construct and operate municipal electric plants and distribution systems, and to issue bonds for the purpose of financing construction of such plants and to receive grants for that purpose (Fdg. 19, R., Vol. I, 452–453).

Applications of the cities for loans and grants.—It was conceded by counsel for the plaintiff, as stated in the opinion of the District Court, that not only do the cities have the legal power to build competing municipal plants, but that "prior to the enactment of the statutes involved they had a desire to build such plants" (R., Vol. I, 438). In each of the cities involved a public election was held to determine whether the city should erect a munici-

pal power plant. In each instance the proposal carried by substantial majorities (Fdgs. 20–30, R., Vol. I, 453–459).

The procedure for handling applications is outlined in Finding 31 (R., Vol. I, 459–461). Loans and grants for the financing of municipal electric projects were dealt with in the same manner and judged by the same tests as other projects (Fdg. 32, R., Vol. I, 461).

The loan and grant agreements.—Each of the existing agreements which are the subject matter of the present suits is set out in full in the record as follows:

Decatur	R., Vol. I, 259–278.
Sheffield	R., Vol. I, 297–315.
Guntersville	R., Vol. I, 378–397.
Hartselle	R., Vol. I, 398–417.
Russellville	R., Vol. I, 417–436.
Iowa City, Iowa	Iowa Record 114–131.

Each of the agreements, except that with Iowa City, is for a loan and grant. In the case of Iowa City, only a grant was requested and is proposed to be made. An examination of the contracts will indicate that those entered into pursuant to the 1933 Act provide for a grant in an amount not to exceed 30% of the cost of the labor and materials employed upon the project; those entered into pursuant to the 1935 Act provide for a grant not to exceed 45% of the cost of the project.

The contracts are all substantially the same. They provide for the purchase by the United States of revenue bonds of the borrower which bear 4% interest per annum and mature serially. The de-

tailed provisions of the contracts relate to the continued responsibility of the borrower and its ability to complete the project, the filing of plans and specifications, the furnishing of information concerning progress of the work, and the carrying of insurance on the project. These provisions are, of course, designed to safeguard the security of the loans. The agreements also provide as conditions precedent to the making of loans and grants that certain labor conditions be met by the cities in the construction of the plants.

With respect to rates, the agreement with Iowa City, which is for a grant only, contains no provision. The agreements for loans and grants to the other cities contain the following provisions with respect to rates. (For illustration, the agreement with the city of Decatur, Alabama, is quoted:)

> 13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.
>
> 14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There

> are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof (R. I., 266).

Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed (Fdg. 38, R., Vol. I, 463).

No attempt was made by the plaintiffs in any case, except with respect to Plainview, Texas, to prove that the loans were not reasonably secured and that the projects were not self-liquidating (Fdg. 42, R., Vol. I, 465). In the case of Plainview, Texas, which has become moot and is not before this Court, extensive testimony was presented by both sides on this question, and the District Court found that there was substantial evidence to support the determination of the Administrator that the project was self-liquidating and that the loan was reasonably secured (*ibid.*).

Each of the projects herein involved has been approved by the Administrator and by the President of the United States (Fdg. 43, R., Vol. I, 465; II, 339–346; 355–361).

Pursuant to the Emergency Relief Appropriation Act of 1935, the President has determined that in the case of the projects to be constructed in the cities of Iowa City, Iowa, and Hartselle, Russellville, and Guntersville, Alabama, with funds appropriated under that Act, 25% of the loan or grant

or the aggregate thereof, will be expended for work on each project (Fdg. 44, R., Vol. I, 465; II, 345–358).

The Public Works program.—A total of 7,957 projects, of many different types and extending into every county in the United States except three, have been approved by the Public Works Administration and funds allocated therefor. Of this number 260 are electric power projects, only 85 being located in places where privately owned electric facilities are now being operated. The amount allotted for all non-Federal P. W. A. projects is $1,222,636,961. The total allotted for the 85 competing electric projects is $58,768,800, representing 1.1% of the total number of allotments and 4.8% of the total amount of allotments (Fdg. 40, R., Vol. I, 464–465; II, 539).

On June 26, 1936, the trial court entered a decree dismissing the bills on the merits (R. I. 472). On appeal to the Court of Appeals the decree of dismissal was unanimously affirmed on the ground that the plaintiffs were without standing to challenge the validity of the loans and grants to the cities. The court held that no legal right of plaintiffs was invaded, since the plaintiffs have no interest which is legally protected against admittedly lawful municipal competition, inasmuch as damages resulting from such lawful competition, however substantial, are *damnum absque injuria*.

The petition for certiorari contains no assignment of error with respect to the findings of the

trial court or to the action of the Court of Appeals in not disturbing the findings.

ARGUMENT

1. The decision of the Court of Appeals that the petitioners have no standing to challenge the validity of the loans and grants is in accord with the decision of every appellate court which has passed upon the question. The same result was reached by the Circuit Court of Appeals for the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *Kennett,* 78 F. (2d) 911, and by the Circuit Court of Appeals for the Fourth Circuit in *Greenwood County* v. *Duke Power Co.,* 81 F. (2d) 986, reversed on other grounds, 299 U. S. 259. In addition, the Circuit Court of Appeals for the Sixth Circuit has held a complainant situated like petitioners to be without standing to raise the question of the validity of the loan and grant agreement, though the opinion therein discusses the interest of the plaintiff company solely as a taxpayer and property owner, and not as a franchise holder. *City of Allegan* v. *Consumers Power Co.,* 71 F. (2d) 477, certiorari denied, 293 U. S. 586. The Supreme Court of Kansas has reached the same result as the court below, and upon similar grounds, adding as an independent reason that the Administrator was not a party to the suit. *Kansas Utilities Co.* v. *City of Burlington,* 141 Kan. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. In the Circuit Court of

Appeals for the Tenth Circuit the question was expressly passed over, the court holding that the statute and the action of the Administrator were valid. *Kansas Gas and Electric Co.* v. *City of Independence,* 79 F. (2d) 32.

There is thus no conflict of decisions.

2. The decision below is sound in principle and is in harmony with applicable decisions of this and other courts in related situations.

It is settled beyond question that the holders of non-exclusive franchises have no interest entitling them to be free from municipal competition which is, as here, lawful in itself. *Helena Water Works Co.* v. *Helena,* 195 U. S. 383; *Madera Water Works* v. *Madera,* 228 U. S. 454; *Springfield Gas Co.* v. *Springfield,* 257 U. S. 66; *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619. As the petitioners have no interest which is legally protected against the competition of the cities, they have no standing to inquire into the validity of the acts of third parties which make that competition possible. Such was the principle announced by this Court in *Railroad Co.* v. *Ellerman,* 105 U. S. 166. There the plaintiff, the operator of a wharf, challenged the authority of the defendant railroad company, owner of another wharf, to lease it and make it available to the public in competition with the plaintiff to his direct and substantial damage. This Court held that the alleged unlawfulness of the defendant's undertaking gave the plaintiff no standing to complain of the resulting competition. "The dam-

age", said Mr. Justice Matthews (p. 173–174), "is attributable to the competition, and to that alone. But the competition is not illegal. * * * The only injury of which [plaintiff] can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right."

While the *Ellerman* case involved specifically acts of a public service corporation alleged to be *ultra vires*, the decision has had its chief exposition and application in cases involving acts of Government officers. A notable instance is *The Chicago Junction Case*, 264 U. S. 258. There a number of railroads brought suit to annul an order of the Interstate Commerce Commission approving a plan by which the New York Central had arranged to acquire control of terminal railroads in Chicago. Previously the terminal facilities had been under neutral control. The plaintiffs alleged that the order of the Commission would result in irreparable injury in the amount of millions of dollars, and that the order was void because there was no evidence to support an essential finding by the Commission. On the question of the standing of plaintiffs to attack the order this Court divided. The majority held that the suit could be maintained, but solely on the ground that the Transportation Act, 1920, conferred upon the plaintiffs a

statutory right to equality of treatment which was violated by the order of the Commission; since the plaintiffs had such a statutory right, they had a cause of action against the Commission for infringing upon that right and the defendants could justify only by showing that they were acting pursuant to a valid order. The minority was of opinion that the Transportation Act, 1920, created no such right to equality of treatment. Mr. Justice Sutherland, delivering the minority opinion, which was not challenged in so far as it stated the applicable principles apart from the 1920 Act, cited the *Ellerman* case as establishing those principles. There was no disagreement as to the result apart from the question of a statutory right conferred by the 1920 Act. The opinion of the majority distinguished the *Ellerman* case, not on the ground that it was inapplicable to Government officers, but solely on the ground that it was not brought under the Interstate Commerce Act, which conferred upon the railroads a statutory right to equality of treatment (264 U. S. at 269, note 12).

In other cases involving orders of the Interstate Commerce Commission giving rise to competition with resulting substantial damage to the complainant, but where the complainant was not afforded special statutory protection, this Court has held that there was no standing to challenge the orders. In *Sprunt & Son* v. *United States*, 281 U. S. 249, shippers brought suit to set aside as void an order of the Commission establishing a new rate struc-

ture which deprived the plaintiffs of a special business advantage which they had previously enjoyed over their competitors, with resulting serious financial loss to the plaintiffs. The Court pointed out that "the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs * * * were not subjected to or threatened with any legal wrong." (281 U. S. at 256–257, citing *Edward Hines Trustees* v. *United States*, 263 U. S. 143.) In the *Sprunt* case, the *Chicago Junction* case was expressly distinguished on the ground that there "an independent legal right of the plaintiff was affected by the order which it was sought to set aside", because "the order violated the plaintiff's right under paragraph 2 of Section 5 to equal treatment (281 U. S. at 257, and 257 note).

The lower Federal courts and the State courts have likewise recognized that there is no standing to complain of lawful, fair, and voluntary competition on the ground that it could not have occurred but for an allegedly invalid act of a Government officer.

In *United States ex rel. New York Warehouse Assn.* v. *Dern*, 68 F. (2d) 773 (App. D. C.), several warehouse companies brought an action against the Secretary of War asking that a lease entered into between that official and a corporation known as the Mercur Company be cancelled. It was alleged (see record in this Court, No. 903, 1933 term) that the plaintiffs were terminal warehouse companies

owning millions of square feet of storage space; that the purported lease was in violation of the statutory authority of the Secretary of War, and that the Comptroller General had so ruled; that the lessee (a corporation with a nominal capital leasing millions of dollars of Government property at a fixed rental of but $1.00 a year plus a percentage of the income from the operation of the warehouse) was in open and direct competition with plaintiffs, with a marked competitive advantage over plaintiffs, and had obtained some of their business and would obtain more, "to the substantial detriment" of plaintiffs. The case was decided on demurrer. The court held that the prospective loss to the plaintiffs as a result of the lease gave them no standing to question the legality of the action of the Secretary of War. This Court denied certiorari. 292 U. S. 642.

Similarly in *Franklin Township* v. *Tugwell*, 85 F. (2d) 208 (App. D. C.), it was held that an owner of property was without standing to complain of the acquisition of land by Government officers which it was alleged would reduce the rental value of the plaintiff's land by virtue of the resulting competition in securing tenants.

Similar results have been reached by the State courts. In *Milwaukee Horse and Cow Commission Co.* v. *Hill*, 207 Wis. 420, it was held that the plaintiff company was without standing to complain of the alleged invalidity of a lease by Government officers which would place the lessee in

competition with the plaintiffs to their substantial damage. See also *Keen* v. *Mayor of Waycross,* 101 Ga., 588, per Lumpkin, P. J.

The decision in *Frost* v. *Corporation Commission,* 278 U. S. 515, pressed upon the courts below but not relied on here, is not to the contrary, as was pointed out by the Court of Appeals. In that case the holder of a franchise was held entitled to complain of the invalidity of a certificate under which a competitor proposed to operate. The competition of the defendant in that case was itself unlawful. See *Corporation Commission* v. *Lowe,* 281 U. S. 431, 435. As was pointed out in *Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382, 392, "An invalid certificate would leave the situation as though none had issued." The *Frost* case would be applicable to the present case only if the proposed undertakings by the cities were beyond their lawful authority. The contrary, as has been pointed out, is clearly established and conceded here. The Circuit Court of Appeals for the Eighth Circuit has expressly distinguished between the situation where the municipal competition is itself unlawful and that where the municipal competition is free from illegality. In *Campbell* v. *Arkansas-Missouri Power Co.,* 55 F. (2d) 560, that court held, on the authority of the *Frost* case, that a utility company was entitled to restrain the city from constructing a competing plant because the issuance of bonds by the city to finance such construction was in excess of its charter powers.

The court held that in those circumstances the city was in the same position as a rival company threatening to compete without having obtained a valid franchise. See, to the same effect, *Iowa Southern Utilities Company* v. *Cassill,* 69 F. (2d) 703 (C. C. A. 8th). In the *City of Kennett* case, *supra,* 78 F. (2d) 911, where the situation was like that in the case at bar, the court expressly distinguished its holding in the *Campbell* case and held that the company was without standing to attack the loan and grant by the Administrator. The other Federal cases cited by petitioners (Pet. 15) are all of the same character as the *Campbell* case. No appellate court has failed to perceive the distinction between such cases, where there is illegality in the action of the municipality, and cases like those at bar, where the action of the municipality is wholly lawful.

The other authorities cited by petitioners (Br. 13–14) are even less in point. *Benton* v. *Pratt,* 2 Wend. 385, and *Rice* v. *Manley,* 66 N. Y. 82, involved fradulent representations resulting in damage; *Angle* v. *Chicago, St. Paul, &c. Ry.,* 151 U. S. 1, and *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229 (as explained in *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 194, 211), involved inducement accompanied by fraud or intimidation; in *Tasker* v. *Stanley,* 153 Mass. 148, the court denied recovery for persuading a wife to leave her husband, in the absence of a showing of fraud or malice. In *United States Fidelity & Guaranty Co.* v. *Millonas,* 206 Ala. 147, and *Gibson*

v. *Fidelity and Casualty Co.*, 232 Ill. 49, the defendants did the acts which terminated in financial loss to plaintiff with the sole and malicious motive or purpose or intention of causing such injury (Cf. the discussion in *Beardsley* v. *Kilmer*, 236 N. Y. 80; *Holbrook* v. *Morrison*, 214 Mass. 209). In *Deon* v. *Kirby Lumber Co.*, 162 La. 671, the court, while sustaining a complaint alleging a coerced boycott springing from private malice, rejected a complaint where the defendant acted as a business competitor in promoting a boycott.

In not a single case cited by petitioners has a cause of action been sustained for merely persuading or inducing another to do a lawful act; nor has it ever been even intimated that a cause of action could be maintained for persuading or inducing or making it possible for another (without malice or fraud) to engage in lawful, fair, and bona fide competition, resulting in damage, however substantial, to a plaintiff.

Petitioners attempt to distinguish between competition and elimination (Pet. 14), and point to the fact that where their franchises have expired, the cities have indicated an intention to order their removal (Pet. 5–6). But that intention is of no significance, since where their franchises have not expired petitioners will in any event withdraw of their own will in the face of municipal competition (Pet. 14). It cannot be seriously contended, we submit, that there is greater standing to complain where a franchise has expired than where it has not.

We do not assert, nor did the court below hold, as stated by petitioners (Pet. 10–11), that no one, no matter how seriously injured, can question the legality of the acts of a public official whose acts cause the injury, "provided its impact upon the plaintiff comes from the intervening legal act of a third party." We do maintain that there is no standing to challenge the acts of a public officer which make possible lawful competition resulting in damage to the plaintiff, and the decisions uniformly so hold.

The courts have been careful to avoid, in the form of an extension of procedural rights, the enlargement of rights of property. "Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights." *Reichelderfer* v. *Quinn*, 287 U. S. 315, 319. This has been notably true in respect of attacks upon voluntary, fair, and lawful competition. Holders of franchises like petitioners have for decades unsuccessfully endeavored to have this Court widen by implication the limited freedom from competition conferred by their franchises. This suit is one more effort to extend such limited rights; to prevent the sovereign States, acting through their municipalities, from exercising the powers reserved to them by the Constitution; and, by indirection, to convert a temporary and for-

tuitous *de facto* monopoly into a legal monopoly, "to create and protect a monopoly which the law does not give." *Railroad Co.* v. *Ellerman, supra,* 105 U. S., at p. 174.

3. The granting of certiorari in *Duke Power Co.* v. *Greenwood County, supra,* should not, we submit, be regarded as controlling here. In that case the petition was devoted in large part to questions of procedural irregularity, upon which the decision of this Court ultimately turned, and to questions of constitutional power, which had been decided by the Circuit Court of Appeals. In the present case the decision below presents no such questions for review.

Furthermore, the questions of constitutional power pretermitted by the decision below have been clarified by opinions of this Court rendered subsequently to the decision of this Court in the *Duke* case.

Objections to the loans and grants based upon a narrow interpretation of the general welfare clause, upon the Tenth Amendment and upon charges of coercion appear to be set at rest by the decisions in *Steward Machine Co.* v. *Davis,* No. 837, and *Helvering* v. *Davis,* No. 910, announced on May 24, 1937. Those cases make it plain that expenditures for the relief of nation-wide unemployment are a proper exercise of Congressional power. Petitioners must therefore contend that,

despite the judgment of Congress and expert opinion, financial aid to States and their subdivisions for a nation-wide program of public works is an inadmissible means of relieving unemployment; or that there must be excluded from such a program the construction of power plants, even though the municipal applicant chooses that type of public works project rather than other eligible types. Indeed, even the features which some of the members of the Court found objectionable in the *Steward* and *Davis* cases are wanting here. The inducement in the present cases is simply the encouragement of public works projects of an extremely diversified character, with complete freedom in States and subdivisions to seek financial aid for any or none of these types of projects. Moreover, no control can be exercised by the Federal Government over the operation of the projects; the rights of the United States are expressly limited to those of a bondholder under the laws of the State, and, of course, cease when the bonds are no longer held by the United States.

On the question of delegation of power, the opinion in *Cincinnati Soap Co.* v. *United States*, No. 659, announced May 3, 1937, is pertinent:

> The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be

plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be alloted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* v. *Hanson,* 167 Fed. 881, 884–885.

In any event, the question of delegation of power is not now involved, since Congress has confirmed and approved the proposed expenditures herein by making subsequent appropriations for the program of public works with specific notice of the proposed loans and grants involved in the cases at bar. *Swayne and Hoyt, Ltd.* v. *United States,* No. 494, present term, decided March 1, 1937.[2]

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[2] On January 16, 1936, Senate Resolution 235 was passed, which directed the Administrator to report to the Senate "a list of all projects involving the generation, transmission, or distribution of electric power, and all projects for the

With respect to the assertion of invalidity because of collateral consequences of the statute, the decision in *Sonzinsky* v. *United States,* No. 614, present term, announced March 29, 1937, is applicable.

And on the question of the effect of the alleged improper motives of the respondent Administrator, a persuasive answer, apart from the findings of the District Court expressly negativing such a charge (R. 462–463), is furnished by the opinion in *Isbrandtsen-Moller Co.* v. *United States,* No. 307, announced February 1, 1937. The contention that

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production and distribution of gas, for which allotments have been made by the Public Works Administration, and to include in such report which projects are under construction, and those which have been delayed because of injunction or other litigation." In response to that Resolution a report was submitted by the Administrator on March 6, 1936, and is printed as Senate Document 184, 74th Congress, 2nd Session. That report contains a list of all approved non-Federal electric power projects as of February 15, 1936, including the amount of the allotment for each and its status in litigation. *Each of the projects involved in the present cases appears in that list.* The Alabama projects appear at p. 3 and the Iowa City project at p. 6.

After the receipt of this report Congress enacted the First Deficiency Act, Fiscal Year 1936, approved June 22, 1936. Title II of that Act (49 Stat. 1608, 1609) authorizes additional expenditures by the Public Works Administration and provides that the limitation upon time with respect to projects financed thereunder shall not apply in the case of projects enjoined in any State or Federal court. The enactment of this statute in these circumstances constituted Congressional approval and ratification of the proposed loans and grants enumerated in the Administrator's report.

the order there involved "sprang from illegal motives, namely, to regulate and stabilize freight rates for the benefit of carriers belonging to steamship conferences, to compel appellant to join a conference, and to create a monopoly in trans-oceanic shipping" was held to be untenable in view of "the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it."[3]

4. Petitioners stress the public importance of the questions involved as a ground for the granting of the writ. We submit that, on the contrary, the public interest will be served by denial of the petition.

In view of the full consideration which this Court has had occasion to give to the problem of unemployment and its continued existence, it is unnecessary to argue that any avoidable delay in valid governmental action which is designed to bring about substantial reemployment would be inimical to the general welfare of the United States. We respectfully call attention to the fact

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[3] The suggestion in the petition (p. 21) of the possible scope of the concept of public works projects is answered by the administrative interpretation of the statutes, as shown in the Administrator's Report of March 1934 (Def. Ex. 10), pp. 124–147, listing the approved non-Federal projects, and in the Administrator's testimony in the Hearings on the First Deficiency Appropriation Bill, 1936, H. R. 12624, 74th Cong., 2d Sess., before a subcommittee of the Senate Committee on Appropriations, containing a later classified list of approved non-Federal projects.

that the denial of certiorari will mean the prompt employment of many thousands of men pursuant to the declared policy of Congress to provide work relief and to relieve unemployment by the construction of public works, whereas the granting of the writ, if the Court adjourns before decision on the merits, will result in the denial for not less than four months of the opportunity to create such employment.

The cases at bar have been pending since the latter part of 1935. There are pending in the District Court for the District of Columbia approximately 50 cases involving issues identical with those involved in the cases at bar. In this group of cases temporary injunctions have been granted preventing the performance of 44 agreements (including two enjoined in part) between the United States and municipalities, calling for the expenditure of over $60,000,000 for the construction of public works projects. As these agreements are obligations of the United States, the sums segregated for expenditure pursuant to the agreements cannot be utilized for other public works projects while these cases are pending.

The trial court found, on the basis of a study undertaken by the Bureau of Labor Statistics, that six complete municipal power projects, financed pursuant to the statute involved in the cases at bar, for which a total of $461,628 was expended for labor and materials, created over 465,000 man-

hours of labor at the site of construction and in fabricating, transporting, and producing the materials used in construction (Finding 46, R. 467). Applying those figures, it can be approximately estimated that the expenditure of the sums involved in the cases at bar and in the other pending cases above referred to, will create more than 60 million man-hours of employment.

Neither the petitioners nor the plaintiffs in the other suits pending in the District Court for the District of Columbia have given any substantial bonds as a condition of the issuance of the interlocutory injunctions which stay the expenditure of the funds. And it is problematical whether the United States can recover any substantial damages because of the delay thereby caused, should those injunctions hereafter be dissolved, for the reason that the injury to the national welfare, to the persons who might otherwise have been employed, and to the cities to whom the use of the money has been denied is incapable of ascertainment in money terms.

The serious consequences of unnecessary delay in these cases were suggested to the Court of Appeals in opposition to petitioners' motion therein to stay the mandate in order to allow the filing of the petition after the adjournment of this Court; and it was doubtless in the light of that factor that the motion to stay the mandate was denied.

CONCLUSION

In view of the uniformity and soundness of the decisions holding that petitioners have no legal interest entitling them to challenge the proposed loans and grants, and the public interest in a prompt determination of the litigation, it is respectfully submitted that the petition should be denied.

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